United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1256

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1256

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN SCHWARTZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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REPLY BRIEF IN BEHALF OF APPELLANT

POINT I

THE GOVERNMENT'S PROOF FAILED, AS A MATTER OF LAW, TO ESTABLISH DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

The essence of the government's brief is contained in a footnote at page 36: "defendant's argument is premised on alleged unawareness of Wertz's dealings

with Maxwell Galleries. The jury resolved this factual issue against the defendant***". The principle issue on this appeal is whether the jury had a sufficient factual basis to resolve that issue against the defendant. Notably, the government does not direct this Court's attention to any fact in the record known to the defendant at the time of the events in question from which it can properly be concluded that the defendant was aware of Wertz's allegedly fraudulent dealings with Maxwell Galleries.

The government does not dispute our contention that there is no evidence, direct or circumstantial, that the defendant had any role in the acquisition of the Pollock painting or that he knew it existed before mid-October, 1973. With respect to later events, the only witnesses, aside from the defendant, who gave any evidence with respect to the defendant's knowledge of "Wertz's dealings with Maxwell Galleries" were Hoffman (the owner of the Gallery), Loughran (the government informant) and Richards (the appraiser). As set forth at pp. 12-13, 14-15 of our main brief, none of these witnesses testified that they told the defendant that the Gallery was claiming fraud or that they even told him any details of the "dealings", other than that Wertz had not yet paid for the painting.

In an effort to cure this obvious deficiency in its case, the government has attempted to build a circumstantial case from a series of insufficient or mis-stated

factual assertions.

A. The Use of a False Name.

The government appears to contend that the defendant knew, as early as August, 1973, that Wertz was doing business under an assumed name (Gov. Br., pp. 26, 37). This contention is not supported by the record. The government witness Delson testified that in August he possessed something called a "Proudfoot Report" (Government Exhibit 81 for identification). During a meeting at Delson's home, in the presence of Schwartz, Delson showed the report to Wertz, but not to Schwartz. No part of the report was read aloud in Schwartz's presence (Tr. 247). Delson then asked Wertz, "Who is this person mentioned in the report, Von Maker?" Wertz responded, "You want to meet Von Maker? I'll get him for you." and "I'm not Von Maker." (Tr. 246). Delson's testimony clearly does not support the contention that, by means of this conversation, "The government's evidence revealed that Schwartz knew about the true identity of Peter Wertz long prior to October 5, 1973." No bystander to such a conversation could know or even suspect anything more than what was said.

Moreover, there is no evidence in this record that the defendant knew or should have known that the use of an assumed name had played any part in or had brought about Wertz's acquisition of the Pollock painting. Indeed, the fact of the assumed name does not appear to have had any significance. As conceded at page 11 of the government's

brief, the owner of Maxwell Galleries (Hoffman) discovered in December, 1973, that Wertz was not using his true name (Gov. Br., p. 11; A. 145-6). Nevertheless, on December 12, 1973, the Gallery agreed in writing to a delayed payment of Wertz's outstanding obligations to it (GX 27; A. 262). In his testimony, Hoffman did not allege that he even discussed the fact of the assumed name with the defendant during their telephone conversation of January 21, 1974 or during their personal meeting of January 24, 1974. (See: A. 156-9).

B. The Fraudulent Sloane Bill of Sale.

The defendant's testimony is that when he acquired the Pollock painting from Wertz, Wertz showed him a bill of sale from a dealer by the name of Sloane to Antique. He further testified that when he learned that Maxwell Galleries had a claim for non-payment, he immediately confronted Wertz with this information and Wertz acknowledged that the painting had not yet been paid for. However, Wertz insisted that he had, nevertheless, purchased the painting from Maxwell Galleries and was the owner, and that he intended to pay for the painting out of the proceeds of the sale of the remainder of the Antique collection. It was at this point that the defendant first learned from Wertz that the Sloane bill of sale was fraudulent. However, contemporaneously with the acquisition of this knowledge, Wertz showed the defendant the actual documents from Maxwell Galleries which

demonstrated the sale to Wertz (GXs 12 and 18). The Sloane bill of sale was, thus, immediately rendered irrelevant to any concern that the defendant might have with respect to Wertz's ownership of the Pollock painting (Tr. 1031-5).

The government makes much of the testimony of its confessed criminal informant, Loughran, to the effect that the defendant had allegedly admitted to Loughran that he, himself, had created the Sloane bill of sale. Loughran's testimony is both incredible and illogical. Loughran first unequivocally pinpointed this conversation as having occurred on Thursday, November 29, 1973 (Tr. 492). On cross-examination, he adhered to that claim, but could not explain why he did not report this information to his F.B.I. contacts until long thereafter (Tr. 585-6). On re-direct examination, following a conversation with the prosecutor, he changed his testimony and asserted that the defendant gave him this information "toward mid-January" of 1974 (Tr. 614-15).

Even if Loughran's general lack of credibility is ignored, his claim makes no sense. As established by Loughran's testimony, the defendant was not aware of Loughran's own criminal propensities (Tr. 459-73; 537-546). The defendant had no reason in the world to make such an admission to Loughran and every reason not to do so. Efforts were still being made, through Loughran, to negotiate the sale of the Antique collection. Moreover, the defendant

had absolutely nothing to gain by knowingly providing the City Bank with a closely documented history of the painting at the time he negotiated the loan. If he were concerned that the Hoffman Gallery would be contacted and that Wertz's non-payment would be revealed, he would be doubly concerned that the Sloane Gallery might be contacted and that the false document would thereby be exposed.

If Loughran's contention with respect to the defendant's alleged admission is correct, it nevertheless does not provide any evidentiary basis for a conclusion that the defendant was aware of any fraud perpetrated on the Maxwell Gallery. At most, he was attempting to keep from the Bank the fact that an outstanding claim existed with respect to payment for the collateral. No matter how good the defendant's title to the painting may have been, conservative banking principles might have resulted in a denial of the loan application. Thus, even if Loughran's testimony is true, it indicates only a malfeasance unrelated to the elements necessary for the proof of the crimes charged in the indictment.

C. The Defendant's Representations to the Undercover Agents.

The government asserts that guilt is indicated by the defendant's claims to the undercover agents that he did not know where Wertz had acquired the painting (Gov. Br., p. 20). The short answer is that the defendant had no such obligation to the apparent prospective purchasers of the painting. If such purchasers considered the information

necessary, they could either have refused to purchase the painting or they could have gone to Wertz directly.

D. The Defendant's Alleged Admissions After His Arrest.

There is nothing in the testimony of any of the arresting agents which supports the contention that the defendant did not believe that he had good title to the painting and was entitled to pledge or sell it. It was the defendant who brought the Sloane bill to the United States Attorney's office and it was the defendant who explained how he came into possession of it and how he subsequently learned of the true origin of the painting. It is ironic that the government sought to use as evidence of the defendant's alleged guilt his expressed intention to pay the outstanding Hoffman bill for the painting out of the proceeds of the sale (Tr. 722). The defendant's statements to the arresting agents and to the United States Attorney squarely conform to the credible evidence at trial.

* * *

The proof at trial failed, as a matter of law, to establish guilty knowledge and intent to defraud on the part of the defendant. United States v. Regent Office Supply Co., 421 F. 2d 1174, 1180 (2d Cir., 1970); United States v. Dougherty, 468 F. 2d 989, 995 (2d Cir., 1972).

In its brief, the government's statement of the facts effectively blurs the line between facts known

to the defendant and facts known to Wertz. A similar approach at trial successfully, but improperly, pursuaded the jury that a verdict of guilt was justified. In our main brief, the statement of facts seeks to segregate the trial proof as it applies to the knowledge of each man. An analysis of the evidence in terms of that critical distinction must necessarily lead to the conclusion that, as a matter of law, the government failed to sustain its proper burden.

Conclusion

For all of the reasons set forth in our main brief, as well as those advanced herein, the judgment of conviction ought be reversed and the indictment should be ordered dismissed.

Respectfully submitted,

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Martin Schwartz

HENRY J. BOITEL,
of Counsel.

October, 1975

UNITED STATES COURT OF APPEALS

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CERTIFICATE OF SERVICE

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York, and a member of the Bar of this Court hereby certifies that on October 3, 1975 he served a copy of the Reply Brief in Behalf of the Appellant upon Paul J. Curran, United States Attorney for the Southern District of New York, 1 St. Andrews Plaza, New York, New York 10007 by depositing same in a post-paid wrapper in an official depository of the United States Post Office within the State of New York.

HENRY J. BOITEL

New York, New York
October 3, 1975